Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DAVID THOMPSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it violates due process for a defendant to be sentenced for conduct not charged in the indictment, nor submitted to a jury, but determined by the judge by a preponderance of the evidence standard and resulting in a sentence which is more than triple the maximum penalty for each count in the indictment.

2. Whether the District Court erred in applying the guideline for attempted first degree murder as to Count Two using a felony murder analysis that was not applicable to the attempted first degree murder guideline when no death occurred, the facts were inconclusive on the element of premeditation and the offense conduct fit the aggravated assault guideline.

3. Whether the District Court erred in refusing to sever Count Two of the indictment, where that count charged possession of a firearm, and involved a resolution of conflicts in testimony as to a shooting and an evaluation of the credibility of the Petitioner, and all other counts constituted basic weapons possession charges, and would not have been admissible in a trial on Count Two.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals in this case.

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United States v. Thompson, No. 3:98-545-011 (D.S.C. Sept. 17, 1999) (Appendix B)

United States v. Thompson, No. 99-4704 (4th Cir. Nov. 2, 2000) (per curiam) (Appendix A)

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on November 2, 2000. Petitioner's Petition for Rehearing En Banc was denied on December 11, 2000. (Appendix C)

The statutory provision which confers jurisdiction in this Court to review on a writ of certiorari the judgment of the Fourth Circuit Court of Appeals is 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THE CASE

See Appendix D.

STATEMENT OF THE CASE

David Thompson was indicted on three counts of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g) and 924(a), and one count of possession of an unlicensed weapon in violation of 26 U.S.C. §§ 5841,

5861(d), and 5871. (JA 17-19.)[1] With respect to Count One of the Indictment, the evidence showed that on March 28, 1998, Officer Painter of the Sumter County Police Department responded to a call of shots fired in a rural area on Harrison Street in Sumter County, South Carolina. (JA 40.) When Officer Painter arrived at the scene he saw eight to ten black males gathered around a white pickup truck, and saw Thompson place a shotgun in the truck. (JA 41-42.) As Painter approached the truck, several individuals scattered leaving only Thompson and two other individuals. Thompson denied shooting the weapon, and the two other individuals told the Officer that one of the people who left the scene was responsible for the shooting. (JA 42.) Officer Painter continued to question Thompson who, according to Painter, admitted shooting the shotgun. (JA 43.) He arrested Thompson and searched the truck, finding the shotgun and a pistol. (JA 43.) Thompson said he used the truck for work but was not the one who drove it. (JA 206-7.)

With respect to Count Two, which also charged an unrelated possession of a firearm, the evidence came primarily from Africa Ford. Ford testified that she met Thompson at a Quick Shop in Sumter South Carolina where Thompson worked. (JA 63.) Prior to the incident she didn't know Thompson that well, and had only seen him at the shop. (JA 63, 66.) Ford testified that on April 4, 1998, she was with her two children and her friend Lakiesha Harris when Lakiesha's father, Pernell Harris, and Thompson came to her house. (JA 64.)

Harris was looking for his daughter whom he said had run away from home several times. He stopped by his father's

1. "JA" refers to the Joint Appendix filed in the Court of Appeals.

store where Thompson was finishing up work and asked Thompson to go with him to Ford's residence. (JA 93.) Harris was concerned that his young daughter was spending time with Ford's brother. (JA 94.) Thompson had no previous plan to go to Ford's house. (JA 207.)

Ford testified that she invited Harris to come into her house, where he began hitting his daughter Lakiesha. (JA 65.) Ford told Harris to stop hitting Lakiesha, at which time the two moved to a corner of the living room and continued talking. (JA 65.) At that time, Thompson entered the house, and Lakiesha and Harris left. (JA 66.) Ford said that Thompson busted through the door, but also said that it was partially open. (JA 76-77, 86.) She said that she never asked Thompson to leave. (JA 76.) Ford testified that Thompson slapped her daughter and when Ford got up to fight him, he pushed her into a chair. (JA 67.) She stated that Thompson then pulled out a silver chrome revolver and shot her once in the stomach. (JA 67-68.) Ford then ran to a neighbor's house. (JA 69.) Ford testified that during the shooting, Thompson and a person she knew only as Sean were in the house. (JA 79.) Several other people, including Harris and Lakiesha were outside the house. (JA 79.) Neither the gun allegedly used to shoot Ford, nor any shell from that gun was ever recovered. (JA 127, 161.)

Thompson denied shooting Ford and testified that Harris fired a shot from the doorway while leaving Ford's residence. (JA 212, 217.) Harris denied this but also said he did not see Thompson with a gun and did not see him fire a shot. (JA 123.) Thompson subsequently went to trial in a South Carolina State Court on attempted murder and other charges relating to this incident and was acquitted.[2]

2. The indictment and jury verdicts of acquittal were made a part of the record by an order of the District Court pursuant to a motion to supplement the record.

To establish the interstate nexus of the weapons allegedly possessed by Thompson, the Government called Agent Kelly of the Bureau of Alcohol, Tobacco and Firearms (ATF). (JA 145.) Over Defense objection, Agent Kelly was qualified as an expert in the interstate nexus of firearms. (JA 149-50.) Kelly testified that he examined the weapons contained in Counts One, Three, and Four of the indictment and concluded that none of them had been manufactured in the State of South Carolina and therefore necessarily crossed state lines. (JA 150-59.)

With respect to the weapon allegedly used by Thompson in Count Two, Kelly testified that the U.S. Attorney advised him that the victim described the weapon as a revolver and that neither the revolver nor any shell casing was recovered from the scene of the alleged shooting. (JA 159-61.) There was no effort to determine whether Ford appreciated the distinction between a pistol and a revolver or whether she used the term merely to denote a handgun. Pistols were made by licensed manufacturers in South Carolina, according to Agent Kelly prior to 1988. (JA 167, 171.) Kelly also testified over objection that according to unidentified medical personnel who treated Ford, the bullet lodged in her body "appeared to be or could have been a .38 caliber projectile". (JA 160.) Kelly testified that a .38 caliber projectile could only have come from a .38 caliber revolver. (JA 160-61.) There was no evidence that an x-ray of the projectile was ever shown to a firearms or ballistics expert to determine the caliber of the bullet with more precision, or to determine if the handgun was a revolver or a pistol.

Using the information made available to him, Agent Kelly looked at reports made to the ATF by licensed manufacturers of weapons in the United States from

1988-1997. (JA 161.) He testified that over that period, no licensed manufacturers in the State of South Carolina reported making a revolver. (JA 161-62.) Kelly further testified that as part of his research into whether any revolvers had ever been manufactured in South Carolina, he spoke by telephone to Agent Offinga in Boston. (JA 162.) Over objection, Kelly testified that Offinga said he had "never heard of a revolver having been manufactured in South Carolina in modern times." (JA 163.) Kelly admitted on cross examination that Offinga had not done any research (like Kelly had done) prior to answering that question. (JA 173.) Kelly concluded that it would be "highly unlikely" for the firearm listed in Count Two of the Indictment to have been manufactured in South Carolina. (JA 164.)

On cross, Kelly testified that he did not research any ATF records prior to 1988, even though such records exist, and admitted that there could be an ATF record of a revolver having been manufactured in South Carolina before 1988, but he didn't check these records. (JA 166.) There was no testimony concerning whether revolvers were made in South Carolina in the first part of 1998 before the shooting which allegedly occurred on April 4, 1998. At one point, the Court inquired: "My question was whether or not you know if before 1988 there were manufacturers in South Carolina who made revolvers; yes, no, or you don't know?" (JA 171.) Kelly responded: "I personally don't know." (JA 171.)

The police obtained a search warrant for Thompson's home. (JA 136.) On April 6, 1998 the Sumter County Police executed the search warrant and found several weapons in Thompson's bedroom. These weapons formed the basis of Counts Three and Four of the Indictment. (JA 136-142.)

Petitioner was convicted after a jury trial and sentenced to ten years on Counts One through Three, and five months on Count Four, with each sentence to run consecutive, for a total sentence of 365 months. (JA 421-422, 431-35.) This sentence was the high end of a level 36 offense. (JA 412.) This level was reached by a sentencing determination that Petitioner was accountable for attempted first degree murder on Count Two, with an enhancement of four points for permanent or life-threatening injuries. (JA 332-34.) Two additional points were added for obstruction of justice, based on the court's opinion that Thompson's trial testimony was false. (JA 336.) The trial court departed upward by two additional points for extreme conduct under U.S.S.G. § 5K2.8, based on a senseless act involving injuries and violence, and gratuitous conduct in that the shooting was in front of Ford's children and one of the children was slapped. (JA 411-12.) There was a further upward departure for inadequate criminal history under § 4A1.3 based on two non-point countable weapons possession charges from 1982. (JA 407-412.) The trial court determined these were similar to the weapons charges on which Petitioner was convicted, although his sentencing level was reached through reliance on the uncharged shooting relating to Count Two of the Indictment, as opposed to the possession of a weapon.

Petitioner filed a notice of appeal to the Fourth Circuit Court of Appeals on September 20, 1999. (JA 436.) The Fourth Circuit affirmed on November 2, 2000, and a Petition for Rehearing *En Banc* was denied on December 11, 2000.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISION IN *APPRENDI v. NEW JERSEY.*

David Thompson is serving a 365 month sentence largely for conduct for which he was not indicted federally and on which he was subsequently acquitted by a South Carolina jury. The maximum penalty for the firearms possession charge to which this conduct relates is ten years. 18 U.S.C. §§ 922(g) and 924(a).

This sentence and the Court of Appeals affirmance of it, violate the dictates of *Apprendi v. New Jersey*, 530 U.S. 466, ___, 120 S. Ct. 2348 (2000), where this Court held "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Id.* at 2362-63.

In this case, Petitioner was convicted of three counts of possession of a firearm by a convicted felon, and one count of possessing a firearm with a prohibited barrel length, each count carrying a maximum sentence of ten years. His sentence (365 months) was effectively tripled based on conduct not included in the indictment and not submitted to a jury, and the sentence substantially exceeded the statutory maximum ten years allowable for Count Two. This uncharged conduct was an alleged shooting incident singularly applicable to the firearm possession alleged in Count Two, and unrelated to the other Counts of the indictment.[3]

3. Each of the issues in this Petition relates to Count Two which was the springboard for the district court's sentencing decisions which effectively tripled Petitioner's sentence.

Subsequent to being sentenced in Federal Court, Thompson was tried on a South Carolina State indictment addressing the uncharged conduct at issue in Count Two, including charges of attempted murder, burglary and aggravated assault, and was found not guilty on all charges. He is nonetheless serving a 365 month federal sentence based largely on the same alleged conduct rejected by a state jury, but never submitted to the federal jury. These acquittals underscore the importance of the due process rights to trial by jury and proof beyond a reasonable doubt, the constitutional underpinnings of *Apprendi*, and demonstrate the unfairness of the "sentencing factors" applied against Petitioner by the district court by a mere preponderance standard.

The Court of Appeals distinguished *Apprendi* by simply holding that since Petitioner's convictions each carried a maximum sentence of ten years, the trial court "did not impose a sentence for any of the convictions above the statutory maximum". *United States v. Thompson*, No. 99-4704 (4th Cir. Nov. 2, 2000) at 4. However, *Apprendi* specifically rejected the suggestion that the use of consecutive sentencing to validate imposition of a sentence exceeding the statutory maximum could cure the infirmities presented by circumventing the due process right to jury trial. *Id.* at 2354. Moreover, because the uncharged conduct related only to Count Two, it elevates form over substance to suggest that the problem of exceeding the statutory maximum on Count Two was cured through the use of consecutive sentences on other counts involving dissimilar conduct.

The jury in this case was asked to determine only whether Thompson possessed a firearm. They were not asked to

resolve the question of whether he engaged in a shooting, although that is the conduct that primarily determined his sentence.

In *Apprendi*, the Court proscribed the practice in which a judge could find facts through a preponderance of the evidence and thereby increase a sentence above a statutory maximum, characterizing this as "a tail which wags the dog of the substantive offense." *Id.* at 2365. In a pre- *Apprendi* posture, the district court made determinations about uncharged conduct which increased Petitioner's sentence approximately threefold and substantially exceeded the statutory maximum. That a South Carolina jury acquitted Petitioner of the very conduct considered by the district court to elevate the sentence confirms the perils presented by "allowing the tail to wag the dog" and circumventing the due process protections of trial by jury and proof beyond a reasonable doubt. Granting review would provide an opportunity to cure an otherwise improper threefold increase in a sentence based on conduct for which Petitioner was subsequently found not guilty, while enabling the Court to define the contours of *Apprendi* in the context of federal sentencing guideline determinations.

II. THE DISTRICT COURT ERRED IN APPLYING AN ATTEMPTED MURDER GUIDELINE.

In addition to the *Apprendi* issue, the district court misapplied several guideline provisions in its sentencing decisions which dramatically increased the guideline computation and resulting sentence.[4] One of the tools used

4. Before trial, the district court appeared to warn Petitioner that it had a penchant for escalating the guidelines, noting that it was often able "to find provisions in the guidelines that allow me to sort of move the numbers up." (JA 33).

by the district court to reach the ultimate sentence was the application of a felony murder rule under U.S.S.G. § 2A2.1, the guideline for assault with intent to commit murder (including attempted murder). Use of this guideline constituted plain error in that no death resulted from the shooting. Use of a felony murder analysis is specifically referenced in § 2A1.1, the guideline for first degree murder, but not § 2A2.1, the guideline for attempted murder. In the absence of a felony attempted murder rule, this guideline should not have been applied. Counsel maintains instead that § 2A2.2, the aggravated assault guideline, was applicable. The Fourth Circuit's affirmance erroneously endorsed the use of a felony murder rule when it is not applicable under these circumstances.

The guidelines for firearms possession offenses are contained in § 2K2.1 of the United States Sentencing Guidelines. Subsection (c)(1)(A) directs the use of § 2X1.1, as a cross-reference, for offenses if the possession was "in connection with the commission or attempted commission of another offense." Thompson maintains that, based on the facts at issue, § 2X1.1 requires application of § 2A2.2, the guideline for aggravated assault, not § 2A1.1, the guideline for attempted first degree murder.[5]

Application Note 1 to § 2A2.2 defines "aggravated assault" as "a felonious assault that involved (a) a dangerous weapon with intent to do bodily harm (i.e. not merely to frighten), or (b) serious bodily injury". Section 2A2.2 contains adjustments for the discharge of a firearm and for

5. Section 2A2.1(a)(2), applicable to attempted second degree murder, would produce a result comparable to § 2A2.2 depending upon application of the adjustments contained in the respective provisions.

bodily injury in varying degrees, including permanent or life-threatening bodily injury. Application Note 3 reflects that the guideline applies to "attempted manslaughter and assault with the intent to commit manslaughter". The Background section to § 2A2.2 states that the guideline applies to "serious (aggravated) assaults". The aggravated assault guideline is applicable to the facts of this case. Simply stated, it is far too speculative instead to apply the guideline for attempted first degree murder.[6]

Application Note 2 to § 2A2.1 defines first degree murder as ". . . conduct, that if committed within the special maritime and territorial jurisdiction of the United States would constitute first degree murder under 18 U.S.C. § 1111". 18 U.S.C. § 1111 requires "malice aforethought" and a "wilful . . . premeditated killing". As an alternative justification for application of § 2A2.1, the trial court evaluated Thompson's conduct in the context of the felony murder component of 18 U.S.C. § 1111, specifically whether the conduct met the enumerated offense of burglary. The court found that Thompson was accountable for a burglary in his entry of Ford's residence and applied the federal murder statute, 18 U.S.C. § 1111, under this felony murder theory. The court also determined that the shooting was accompanied with

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6. To the extent that the sentencing guidelines were adopted to achieve a degree of uniformity in sentencing (See, Chapter One, Part A.3, Basic Approach (Policy Statement)), the sentencing process used in this case is highly inconsistent with that goal. The process used below would allow a sentencing range of from just under ten years to the sentence of over 30 years imposed in this case, depending upon a resolution of "sentencing" factors determined solely by a judge and not a jury. Applying *Apprendi* to the sentencing process at issue would thus promote a fundamental goal underlying the sentencing guidelines.

premeditation. The facts do not support either basis for applying the first degree murder guideline, although the felony murder analysis should not have even been considered.

Although Thompson argued below that the facts do not meet the elements necessary for burglary and thus preclude application of a felony murder rule, there is a more fundamental reason to reject a felony murder analysis. A felony murder rule is not available when death has not occurred. Section 2A1.1, the guideline for first degree murder within Part A(1), relating to homicide, expressly references application of the felony murder rule. Application Note 1 addresses the penalty for a "premeditated killing", and specifically observes that ". . . this guideline also applies *when death results* from the commission of certain felonies". (Emphasis added.)

Section 2A2.1, covering assault with intent to commit murder and attempted murder, unlike § 2A1.1, does not contain any reference to possible application of the felony murder doctrine. Application Note 2 in defining first degree murder by reference to 18 U.S.C. § 1111, addresses the need for proof of malice aforethought and premeditation, elements of 18 U.S.C. § 1111. It does not invite an application of some expanded concept of felony murder or create a new felony attempted murder rule.

The Tenth Circuit recently addressed these issues in the appeals following the Oklahoma City bombing convictions. In *United States v. Fortier*, 180 F.3d 1217 (10th Cir. 1999), an application of the first degree murder guideline was rejected, as was an attempted use of a felony murder theory. While the facts applicable to defendant Fortier were unique to that case, the Tenth Circuit observed that:

> The doctrine of felony murder expresses a highly artificial concept that generally deserves no extension. In keeping with our desire not to duly expand the doctrine, we hold our decision in the context of sentencing must be made with 18 U.S.C. § 1111(a) as a guide.

Id. at 1226, *quoting*, *United States v. Nichols*, 169 F.3d 1255, 1273 (10th Cir. 1999). *Nichols*, in turn, cites *Wharton's Criminal Law*, § 142, at 296-97 (15th Ed. 1994):

> . . . [t]here is an intended felony and an unintended homicide. The malice which plays a part in the commission of the felony is transferred by the law to the homicide. As a result of the fictional transfer, the homicide is deemed committed with malice; and a homicide with malice is, by definition, common law murder.

Id. at 1272, *quoting*, *United States v. Pearson*, 159 F.3d 480, 485 (10th Cir. 1998).

The trial court erroneously used a burglary/felony murder theory to support its application of § 2A1.1, the guideline for attempted first degree murder. Because no death occurred, this was an inappropriate use of that doctrine and an incorrect application of the guidelines. Because it is not certain that the court would have applied § 2A1.1 on the basis of a finding of premeditation independent of the misuse of the felony murder concept, a remand is appropriate.

Aside from the legal inapplicability of the felony murder rule, the facts do not support its use. To constitute burglary under South Carolina law, Petitioner had to forcibly

enter Ford's residence without authority, and with intent to commit a crime. (JA 484.) Even Ford's testimony on this point was in conflict, and other testimony does not support a charge of burglary. Ford testified that Thompson busted through her door; however, she testified on cross-examination that the door was partially open (JA 77), and that in addition to Roland Harris who came in before Thompson, another individual named Sean was already in the house. (JA 82-83.) Thompson and Harris both knew Sean, and his presence would suggest permission to enter. (JA 182-83.) She also stated that there were a number of other individuals on the front porch. (JA 79.) Significantly, once he was in the house, Ford never asked Thompson to leave. Conversely, she did issue commands to Pernell Harris, demanding that he quit hitting his daughter in front of the children. Sean Kelly testified that he was there because he heard that there was a party. (JA 183.) This evidence does not support a conclusion that Thompson's entry into Ford's residence met the without permission and against her will component of burglary.

The evidence as to whether Thompson had an intent to commit a felony when he entered is also inconclusive. It is just as likely that his decision to act was made after entry into the house and in response to Ford's actions, rather than conduct accompanied with some preconceived intent, especially since he had no plan to go there until Harris stopped off to get him. For either reason, there is an insufficient basis to conclude Thompson's conduct amounted to burglary and then bootstrap that conclusion to apply an attempted first degree murder guideline.

There is also an insufficient basis to conclude Petitioner had any premeditation to murder Ford. While they knew each other slightly, there was no prior indication of animosity.

The same factors militating against concluding Thompson had an intent to commit a felony upon entering Ford's residence also suggest a lack of premeditation. There simply is no way to determine whether the conduct was a sudden outburst or a preconceived act. The evidence was that a single shot was fired, not a series of shots often reflecting an intent to murder. For guideline purposes, the discharge of a firearm does not automatically equate to attempted murder. In fact, § 2A2.2, the aggravated assault guideline, provides for adjustments in subsection (b)(2) for the discharge of a firearm, and in (b)(3) for degrees of bodily injury, including permanent or life-threatening bodily injury.[7]

In applying § 2A2.1, the court made findings that the conduct amounted to burglary and that there was premeditation. The latter was based primarily on the court's determination that Petitioner remained in the house after Harris had gone out the door with Lakiesha, although the evidence was not clear on this issue. The court did not expressly find malice aforethought, a required element.[8]

Section 2X1.1(a), which is cross-referenced from § 2K2.1, the provision normally applicable to firearms possession offenses, calls for adjustments "*for any intended offense conduct that can be established with reasonable certainty*". (Emphasis added.) The conclusions necessary for applying § 2A1.1 are too speculative and cannot be made with "reasonable certainty". Courts "must not speculate concerning the existence of a fact which would permit a more

7. The attempted murder guideline, § 2A2.1, also provides for an enhancement for bodily injury in subsection (b)(1)(A-C).

8. *Ornelas v. United States*, 236 F.2d 392, 394 (9th Cir. 1956). *See also Beardslee v. U.S.*, 387 F.2d 280, 289 (8th Cir. 1967).

severe sentence under the guidelines." *United States v. Wilson*, 993 F.2d 214, 218 (11th Cir. 1993). *See also United States v. Williams*, 47 F.3d 1559, 1566 (11th Cir. 1995) "preponderance standard is not toothless"). Application of the attempted first degree murder guideline requires speculation on facts and issues relating to Thompson's intent, both at the time of entering the residence and when discharging a firearm. When facts are equally capable of differing interpretations, courts should exercise a rule of lenity in the decision of which interpretation to apply. *Cf., Bell v. United States*, 349 U.S. 81, 75 S. Ct. 620, 99 L. Ed. 905 (1955).

The court's findings as to burglary constitute an incorrect application of the guidelines since the felony murder concept is not available as to § 2A2.1. The court's findings as to burglary and premeditation are also clearly erroneous. Particularly as to the latter, the court has made inferences which amount to speculation to support its application of the guidelines.[9] Moreover, based on *Apprendi*, these are factors which should have been submitted to a jury and not determined by a judge. The aggravated assault guideline is most applicable to the facts at issue, and its application would not offend *Apprendi*. This Court should remand for resentencing to apply that guideline or otherwise sentence within the statutory maximum.

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9. As argued in Section 1, the issues decided by the court were resolved by a preponderance of the evidence standard. These issues were particularly of a type of fact finding normally resolved by a jury. Petitioner should have been entitled to have these issues put to a jury and subject to proof beyond a reasonable doubt based on *Apprendi*, *supra*, and not determined exclusively by a judge in light of the effect these decisions had on his sentence. In effect, Petitioner was convicted and sentenced in a bench trial conducted at sentencing.

III. THE DISTRICT COURT ERRED IN FAILING TO GRANT PETITIONER'S MOTION FOR SEVERANCE.

The panel decision in this case also conflicts with Fourth Circuit precedent in that the severance issue was not analyzed in the context of Rule 404(b) of the Federal Rules of Evidence as required by *United States v. Foutz*, 540 F.2d 733 (4th Cir. 1976). Prior to trial, Petitioner moved for a severance of offenses. Counts One, Three and Four of the Indictment involved the simple possession of weapons on three different dates. Count Two (also a possession count) related to the alleged shooting of a woman, and required a mini trial on whether Thompson shot the woman. There was conflicting evidence concerning the shooting. Thompson testified and denied the shooting, making his credibility a critical issue. The facts relating to the weapons possessions in Counts One, Three and Four prejudiced Thompson on a resolution of the facts at issue in Count Two, the charge on which the severe escalation of his sentence was largely based.

Counsel below and on appeal cited *Foutz*, *supra*. In that case the Defendant was charged in one indictment with robbing the same bank on two different occasions. *Id.* at 735. The Fourth Circuit held that the defendant was prejudiced by the joinder, and that it was an abuse of the trial court's discretion to deny severance. Where two or more offenses are joined pursuant to Federal Rule of Criminal Procedure 8, on the basis that they are of the "same or similar character", they must be severed on the basis of Rule 404(b) if evidence of one would not be admissible in a trial of other counts. *Id.* at 736.

The Court of Appeals cited *Foutz* in its opinion, but did not analyze the case in the context of Rule 404(b). Moreover, the opinion did not discuss or distinguish *United States v. Tate*, 715 F.2d 864 (4th Cir. 1983) which held that the trial court committed reversible error in an 18 U.S.C. § 922 (firearms possession) case in admitting testimony that the defendant had, on a prior occasion, been seen in possession of a gun. The prejudice recognized in *Tate* is present in this case. *Tate* held that testimony of a prior weapon possession amounted to prohibited character evidence under Rule 404(b) as it tended to prove that "the defendant possesse[d] a criminal character or otherwise had the propensity to commit the crime with which he is charged." *Id.* at 865. As in *Tate*, Thompson was prejudiced by the joinder of offenses. In deciding whether Mr. Thompson possessed a weapon in Count Two, the count relating to a shooting incident, the jury heard evidence that he had the propensity to carry weapons at other times. This is the type of inference prohibited by *Tate* and Rule 404(b), particularly because the determination by the jury that Thompson merely possessed the weapon in Count Two was then used by the district court to sentence him for attempted murder. The limited jury determination which was involved, i.e. was there possession of a weapon, should have been allowed to be made without the prejudice accompanying inclusion of the other counts to which Thompson essentially confessed.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted. Failure to do so will cause Petitioner to serve a 365 month sentence for conduct on which he was acquitted by the only jury to decide whether he had engaged in a shooting.

Respectfully submitted,

NICHOLAS A. LOTITO
SETH D. KIRSCHENBAUM*
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Attorneys for Petitioner

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APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND DECIDED NOVEMBER 2, 2000

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 99-4704

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID THOMPSON, a/k/a Bam,

Defendant-Appellant.

Appeal from the United States District Court
for the District of South Carolina, at Columbia.
Dennis W. Shedd, District Judge.
(CR-98-545-DWS).

Submitted: October 20, 2000

Decided: November 2, 2000

Before MICHAEL and TRAXLER, Circuit Judges, and
HAMILTON, Senior Circuit Judge.

* * *

Appendix A

OPINION

PER CURIAM:

David Thompson was convicted by a jury of three counts of being a felon in possession of a firearm in violation of 18 U.S.C.A. §§ 922(g), 924(a) (West 2000), and one count of possessing an unregistered modified shotgun in violation of 26 U.S.C. §§ 5841, 5861(d), 5871 (1994). On appeal, Thompson claims that the district court erred by: (1) denying a motion to sever the charges; (2) denying a motion for a directed verdict based upon the Government's failure to prove beyond a reasonable doubt that a firearm crossed state lines; (3) imposing a sentence based on a finding of certain facts beyond a pre-ponderance of the evidence; (4) increasing Appellant's base offense level based on a felony murder analysis; (5) upwardly departing from the Sentencing Guidelines based on a finding that Appellant's criminal history was inadequate; and (6) departing for extreme conduct in light of the allegation that the Sentencing Guidelines range was based on the same facts. Finding no reversible error, we affirm.

This Court reviews a district court's denial of a motion for severance under an abuse of discretion standard. *See United States v. Ford*, 88 F.3d 1350, 1361 (4th Cir. 1996). Offenses may be joined together in the same indictment if they "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Fed. R. Crim. P. 8(a). Severance is warranted if the defendant would be prejudiced by the joinder. *See* Fed. R.

Crim. P. 14. The determination should weigh potential prejudice against the interests of judicial economy. *See United States v. Samuels*, 970 F.2d 1312, 1314 (4th Cir. 1992). When two or more offenses are joined because the offenses are of a same or similar character:

> three sources of prejudice are possible which may justify the granting of a severance under Rule 14: (1) the jury may confuse and cumulate the evidence, and convict the defendant of one or both crimes when it would not convict him of either if it could keep the evidence properly segregated; (2) the defendant may be confounded in presenting defenses, as where he desires to assert his privilege against self-incrimination with respect to one crime but not the other; or (3) the jury may conclude that the defendant is guilty of one crime and then find him guilty of the other because of his criminal disposition.

United States v. Foutz, 540 F.2d 733, 736 (4th Cir. 1976) (internal citations omitted).

We find that Thompson was not prejudiced by the joinder and the district court did not abuse its discretion by denying the motion for severance. Joinder was initially proper because the offenses were all of a same or similar character. There is no evidence that the jury was confused or cumulated the evidence. The evidence as to each count was simple and direct. Thompson admitted possessing the weapons relating to counts one, three and four.* (J.A. at 204-05, 213-14).

---

* He denied owning the weapons.

Count two was supported by eyewitness and expert testimony establishing that Thompson possessed a silver revolver that traveled in interstate commerce. Furthermore, it is unlikely that the jury convicted Thompson based upon his criminal disposition. *See Samuels*, 970 F.2d at 1314.

We further find that there was substantial evidence supporting count two of the indictment. The interstate expert's opinion as to the fact that the revolver was not manufactured in South Carolina was based on his own experience, research and consultations. The district court did not abuse its discretion by permitting the expert to testify as to the basis of his opinion, as this was the type of information an interstate nexus expert would rely upon in order to arrive at an opinion. *See* Fed. R. Evid. 703; *see also United States v. Corey*, 207 F.3d 84, 87-91 (1st Cir. 2000); *United States v. Mann*, 712 F.2d 941, 942 (4th Cir. 1983). In addition, we agree with the district court's conclusion that Kelly's admission that there was a possibility that the revolver may have been manufactured in South Carolina did not compel the conclusion that the Government failed to prove its case.

We further find that Thompson's sentence was not affected by *Apprendi v. New Jersey*, 503 U.S. __, 2000 WL 807189 (U.S. June 26, 2000) (No. 99-478). Thompson's convictions each carried a maximum sentence of ten years' imprisonment. The district court did not impose a sentence for any of the convictions above the statutory maximum.

The district court found that Thompson's conduct with respect to count two of the charges involved possession of a revolver during the commission of another offense, attempted

murder, and cross-referenced USSG § 2X1.1. *See U.S. Sentencing Guidelines Manual* § 2K2.1(c)(1)(A) (1998). Pursuant to USSG § 2X1.1(a), the court applied the base offense level for assault with intent to commit murder under USSG § 2A2.1(a)(1) upon finding that the object of Thompson's conduct was first degree murder.

At sentencing, the district court's factual findings are reviewed under the clearly erroneous standard. *See United States v. Gormley*, 201 F.3d 290, 295 (4th Cir. 2000). This Court is reluctant to overturn the district court's factual findings. *See United States v. D'Anjou*, 16 F.3d 604, 614 (4th Cir. 1994). The court's interpretation of the Sentencing Guidelines is reviewed de novo. *See Gormley*, 201 F.3d at 295. We find no clear error in the court's factual findings. Furthermore, we find that the court did not err by applying the base offense level under USSG § 2A2.1(a)(1) on the basis that Thompson's conduct, if completed, would have amounted to felony murder.

We further find that the district court did not abuse its discretion by finding that Thompson's criminal history category did not adequately reflect his prior criminal conduct and the likelihood that he would engage in future criminal conduct. *See Koon v. United States*, 518 U.S. 81, 100 (1996) (review district court's decision to depart for abuse of discretion). An upward departure is warranted if the court finds that the defendant has an " 'extensive record' that is not adequately reflected by [his] Criminal History Category, or [ ] whose criminal background shows [him] to 'pose a greater risk of serious recidivism,' " *United States v. Blake*, 81 F.3d 498 (4th Cir. 1996) (quoting USSG § 4A1.3,

comment. (backg'd.)). A court may consider convictions, although too old in time to be assigned criminal history points, if the conduct of the prior convictions is similar to the current convictions. *See* USSG § 4A1.3, comment. (n.8).

Finally, we find that the district court did not abuse its discretion by increasing Thompson's base offense level because of extreme conduct under USSG § 5K2.8. Under USSG § 5K2.0, a departure outside the Sentencing Guidelines range may be warranted if "the court finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.' " (quoting 18 U.S.C. § 3553(b) (1994)). In order for a district court to depart, it must first consider whether the factor it believes warrants a departure is not to be used for such a purpose. *See* USSG §§ 5H1.1 to 5H1.12. On the other hand, if the Sentencing Guidelines state that the factor is to be considered as a basis for departure, the court may depart based upon the factor if the factor is not already considered in the Sentencing Guidelines. *See United States v. Hairston*, 96 F.3d 102, 105-06 (4th Cir. 1996). If the factor is encouraged as a basis for departure and taken into account by the Sentencing Guidelines, then the court may depart "only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present." *Koon*, 518 U.S. at 96.

A departure based upon extreme conduct is encouraged. In the instant case, the district court determined that Thompson's conduct was not within the heartland of conduct

encompassed by the cross-reference in USSG § 2K2.1(c). "Ordinarily, a determination of '[w]hether a given factor is present to a degree not adequately considered by the Commission' will be made 'in large part by comparison with the facts of other Guidelines cases.' Because of the 'institutional advantage' of district courts in making such factual determinations, appellate courts accord considerable deference to their departure decisions, limiting review on appeal to abuse of discretion." *United States v. Paster*, 173 F.3d 206, 217 (3d Cir. 1999) (quoting *Koon*, 518 U.S. at 98-100).

We affirm Thompson's convictions and sentences. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA DATED AND FILED SEPTEMBER 17, 1999

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Case Number: 3:98-545-001 (DWS)

UNITED STATES OF AMERICA

vs.

David "Bam" Thompson

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

John H. Hare, AFPD
Defendant's Attorney

THE DEFENDANT:

* * *

■ was found guilty on count(s) 1, 2, 3 and 4 of the superseding indictment on 1/13/99 after a plea of not guilty.

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Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 922(g) and 924(a)	see superseding indictment	3/28/98	1
18 USC 922(g) and 924(a)	see superseding indictment	4/4/98	2
18 USC 922(g) and 924(a)	see superseding indictment	4/6/98	3
26 USC 5481, 5861(d) and 5871	see superseding indictment	4/6/98	4

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Appendix B

Defendant's Soc. Sec. No.: 058-45-3208	September 10, 1999 Date of Imposition of Judgment
Defendant's Date of Birth: 7/31/60	
Defendant's USM No.: 94251-071	s/ Dennis W. Shedd Signature of Judicial Officer
Defendant's Residence Address: 16 Harrison Street Sumter, South Carolina 29150	Dennis W. Shedd, United States District Judge Name and Title of Judicial Officer
Defendant's Mailing Address: 16 Harrison Street Sumter, South Carolina 29150	September 17, 1999 Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of Three Hundred Sixty-five (365) months. This term consist of One Hundred Twenty (120) months as to count 1; One Hundred Twenty (120) months as to count 2, to run consecutive with count 1; One Hundred Twenty (120) months as to count 3, to run consecutive to counts 1 and 2; and Five (5) months as to count 4, to run consecutive to counts 1, 2 and 3.

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■ The defendant is remanded to the custody of the United States Marshal.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Three (3) years as to Counts 1 through 4, those terms to run concurrent.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

* * *

■ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

Appendix B

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer

to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant will make all checks and money orders payable to the "**Clerk, U.S. District Court**" unless otherwise directed by the court.

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

Assessment

Totals: **$ 400.00**

The above special assessment is due: immediately.

* * *

STATEMENT OF REASONS

Information on this page reflects ranges under Sentencing Guidelines and is used for statistical purposes only. Please refer to other pages in the judgment for the actual sentence.

■ The court adopts the factual findings and guideline application in the presentence report as amended.

* * *

Appendix B

Guideline Range Determined by the Court:

Total Offense Level: 34

Criminal History Category: IV

Imprisonment Range: 210 to 262 months

Supervised Release Range: — to 3 years

* * *

■ Fine waived because of inability to pay.

* * *

■ The sentence departs from the guideline range:

* * *

■ for the following specific reason(s): Inadequacy of criminal history and likely to commit other crimes once released from incarceration.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED DECEMBER 11, 2000

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-4704
CR-98-545-DWS

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

DAVID THOMPSON, a/k/a Bam

Defendant – Appellant

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

Appendix C

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX D — RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND OTHER AUTHORITY

This case involves the Fifth and Sixth Amendments to the United States Constitution as well as various Federal Statutes and Sentencing Guidelines Rules of Procedure and Rules of Evidence.

1. The Fifth Amendment to the United States Constitution states in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Sixth Amendment to the United States Constitution states in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause

of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

3. 18 U.S.C. § 922(g) states in pertinent part:

It shall be unlawful for any person — (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year; . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

4. 18 U.S.C. § 924(a)(2) states in pertinent part:

Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

5. United States Sentencing Guideline Chapter 1, Part A, Subsection (3) provides in pertinent part:

The Basic Approach (Policy Statement)

. . . Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.